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No. 79-5269

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT EDWARDS, *Petitioner,*

v.

THE STATE OF ARIZONA, *Respondent.*

On Writ Of Certiorari To
The Arizona Supreme Court

PETITIONER'S REPLY BRIEF

MICHAEL J. MEEHAN
Post Office Box 2268
Tucson, Arizona 85702
(602) 622-3531
Court Appointed Attorney
for Petitioner

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SUMMARY OF ARGUMENT

The State's references to various record matters are substantially in error. The State contends that Edwards never told any detective that he wanted an attorney before he would make any statement. That is wrong. Other errors of fact exist. The State tries to draw inferences about Edwards' intentions which are illogical and unsupportable. For example, the State argues that by giving a verbal statement to the interrogating police, but refusing to give a written one, Edwards was engaged in a plan to manipulate the prosecutorial system. Supposedly, he was making a statement with built-in deniability. This makes no sense. Either he would have made a voluntary statement or not.

There are incomplete and misleading quotations from, and discussions about, *Miranda* v. *Arizona,* 384

U.S. 436 (1966), *Michigan* v. *Mosley,* 423 U.S. 96 (1975). Cases from the Courts of Appeal, which discuss what was intended in *Miranda,* are incorrectly quoted. The product of these erroneous discussions is the State's argument that there should be no differing treatment between the two situations, of an accused asking for counsel, or simply staying silent. Such a holding would unnecessarily confuse the meaning of *Miranda,* and would ride roughshod over this Court's previous recognition that an accused who asks for counsel really cannot deal with the State, and ought not to be reinterrogated until he gets the assistance that he needs and is entitled to.

The State's arguments also fail to appreciate the import of the fact that the interrogation at issue was conducted after formal prosecution had commenced, and that the Sixth Amendment right to trial counsel's assistance existed. Therefore, the State mistakenly argues that police investigative considerations ought to be weighed against the Sixth Amendment right to counsel, when in fact investigation was not at issue. It also mistakenly argues that the police ought to be able to urge an accused to change his mind and not avail himself of his right to assistance of counsel, when of course the accused has already decided that he wants a lawyer to act for him and be with him in all critical stages after prosecution has commenced, including interrogation by police. The State's Brief also fails to recognize the high standard of waiver, required by *Johnson* v. *Zerbst,* 304 U.S. 458 (1938), if waiver is at issue here; and it presents no facts nor argument that could support a finding that *Johnson's* waiver standards were met.

ARGUMENT

I

Errors of Fact in The State's Brief.

A number of factual errors permeate the State's Brief, allowing the State to bolster its legal arguments both subtly and impermissibly. The more glaring of these errors are the contention that Edwards never clearly said that he wanted an attorney before he would speak to the police, and the claim that no interrogation occurred on the morning before Edwards' court appearance.

Strangely, the State never mentioned the fact that the police timed their interrogation to beat that court appearance at which Edwards would get counsel, nor did it attempt to justify that, except to say that police investigative functions would be jeopardized by prohibiting interrogations that are intended only to elicit trial evidence. That contention is dealt with in Argument III below.

Another factual error that pervades the State's Brief is the rather ludicrous argument that Edwards responded to the police interrogation on the morning of his arraignment with the purpose of "manipulating the judicial system", by making a statement that he could later deny having given. The State argues that such a manipulation demonstrates a knowing and intelligent waiver of the right to counsel, a contention with which we deal in Argument III below. Such a claim is illogical and can be squared neither with the concept of a voluntary confession nor the intentional relinquishment of the right to counsel. If the statement was voluntary, Edwards had no need to disavow it in the future. If it was not, it is inadmissible.

Some of the factual errors made by the State are:

On pages 5-6 of the Respondent's Brief[1], the State says, "At no time did Edwards say to Sgt. Bunting or any of the other officers that he would not talk to them until he spoke to an attorney." And see R.B. 28. This is clearly belied by the record.[2] The trial court found "that Mr. Edwards intended to have an attorney and intended not to make any statement until he was represented by counsel." J.A. 1. In Bunting's own words:

> "I remember the county attorney's office. When no deal was made you [Edwards] left stating, 'I'm going to wait until I get an attorney to make a deal for me. I'm not going to make a deal now. *I'm not going to make a statement now. I'm going to wait until I get my attorney.' That's the way it was left.* That's all the discussion we had about it." J.A. 151. (Emphasis added.)

The same understanding by Bunting that Edwards would wait until he got an attorney, both for a deal and to make a statement, permeates Bunting's testimony, J.A. 38-41.

At page 27 of the State's Brief, it is asserted that on the day Edwards was arrested he was "informed of his rights three times: At the time of his arrest . . ." This is simply

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[1] Hereinafter cited as R.B., with page number.

[2] The Arizona Supreme Court unequivocally found that Petitioner had asserted his right to counsel the evening of the interrogation by Sgt. Bunting. See J.A. 16:

> "We hold, therefore, looking at Edwards' statement in the context made, that although it was equivocal, its meaning was sufficiently clear and, therefore, it must be interpreted as a request for counsel, and as a request to remain silent until counsel was present".

false. (See J.A. 13 — Arizona Supreme Court Opinion: "Edwards was arrested at his home at 4:00 o'clock p.m. He was not read the Miranda warnings at that time . . ."; J.A. 31 — answers by Detective Bunting: "Q. At the time he was arrested did you go over his Miranda rights with Mr. Edwards? A. Not at the moment of arrest. Later at the police station"; J.A. 45 — Answers by Detective Bunting: "Twice he was advised." See also, J.A. 18.) Having made this error in its statement of facts, the State proceeds to build its argument upon the erroneous contention that Edwards waived his rights on the 20th, because he had been given his rights on several separate occasions.

The clearest factual error is the contention, R.B. 22, that no interrogation of Edwards occurred on the morning before he was to be arraigned. *Rhode Island* v. *Innis*, ____ U.S. ____ (1980), is the supporting citation, and no doubt the inspiration, for the argument. Such a contention is untenable. The record in this case is replete with evidence that Detectives Marmion and Milne fully intended to elicit incriminating responses from the Petitioner.[3]

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[3] See, for example,

"I had one thing on my mind, to go out there and question him about his murder, and see what he was willing to say." J.A. 52 (by Marmion).

"Detective Marmion was going out to interview Mr. Barefield and I accompanied him", "Detective Marmion interviewed Mr. Edwards." J.A. 141 (by Milne).

"Q. Is there any reason why two rather than one detective went to the Pima County Jail to talk to Mr. Edwards?

A. Well, I wasn't going to the jail for the purpose of talking to Mr. Edwards. I was going to the jail for the purpose of just being a witness to any statements that he made.

At page 6 of its Brief, the State says that Sergeant Bunting assigned Detective Milne to go along with Detective Marmion to the interrogation of Edwards "as part of Detective Milne's educational process." Although Milne did say that accompanying Marmion was "an educational process for myself", J.A. 140-41, there was no testimony that he went to the jail for an education. The State's attempt to persuade this Court that Milne's presence was fortuitous, in an effort to show that the trip to the jail was not for interrogation, is frivolous. Marmion deliberately set out to obtain a statement from Edwards. Milne went along as a witness. (J.A. 68 — by Milne, "I was going to the jail for the purpose of just being a witness to any statements that [Edwards] made.") The Tucson police detectives were not on an educational sojourn to the jail; nor were they investigating the crime. Rather, they were

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Q. The express purpose then, at least as far as you knew, of going to the jail that day was to obtain a statement.

A. Was to interview Mr. Barefield with the obvious — *obtaining the statement would be obvious.*" J.A. 68 (by Milne). [Emphasis supplied.]

"Q. After you played that portion of Mr. Soto's statement, did you ask Mr. Edwards some questions about the La Conga Bar incident?

A. We did." S.A. 25 (by Marmion)

These cites from the record clearly establish that it was the full intention of the police to interrogate Mr. Edwards when they went to the jail that morning.

deliberately attempting to obtain a confession for use at Edwards' trial, and to do so before the Defendant even had an opportunity to have counsel appointed for him. To characterize Milne's presence as part of an "educational process" paints a false picture of what occurred on the morning of January 20.

The State implies disbelief of Petitioner's testimony that when Marmion wanted to interrogate him on January 20th, Edwards told the detention officer that he did not want to talk to the detectives (R.B. 29). The State went to great pains to dispute any other portions of Edwards' testimony that it could. For example, it recalled various detectives to testify how late the evening before Edwards was taken to the jail (J.A. 90). It did not bother to present any such testimony on this subject. Although the trial court did find the testimony of the arresting officers to be credible as compared to that of Edwards in those areas where there was a conflict, his testimony that he did not want to leave his cell when requested to do so by the detention officer stands uncontradicted. Rather than being reluctantly admitted facts as the State would have it, both courts below agreed that Edwards did not want to be reinterrogated, but was told that he must visit with the officers. Justice Gordon, in his dissent, accepted this testimony, and the trial court also concluded that the officers, and not Edwards, instituted the reinterrogation on the morning of the 20th.

The State would also have this Court believe that Edwards was engaged in a carefully thought out strategy, aimed at affording him the opportunity to make a statement and later deny that he had done so. It did so

partly on the basis of psychiatric testimony as to which the State itself objected, and which objection the Court sustained! Tr. March 24, 1977, pp. 4-6, 4-7. But it is difficult to conceive of Edwards, as to whom that psychiatrist reported intelligence levels "in the borderline of dull-normal intelligence",[4] concocting a grandiose scheme "to manipulate [the judicial system] to his advantage" (R.B. 31) in the course of an overnight stay in the Pima County Jail and in the grips of the frightened mental turmoil that would inevitably follow from an arrest for murder.

Another aspect of the so-called scheme to manipulate the system to his advantage is the assertion by the State that Edwards at some times denied having made the statement as to which Marmion testified. As we have previously indicated (Opening Brief, p. 55, n. 38), the manner by which the prosecutor questioned Edwards at the suppression hearing engendered confusion about whether a "statement" was taken from Edwards, as opposed to whether Edwards made verbal statements to the officers. By that time, Edwards' wit and intellect had been daunted by a year's incarceration in the County Jail, which, in the psychiatrist's opinion, had dulled Edwards' ability to think.[5] Furthermore, the State's contention that

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[4] In the record, see the Report of Dr. David Gurland, December 13, 1976.

[5] Tr. March 24, 1977, pp. 4-5. It is not surprising that spending a year in the Pima County Jail dulled Edwards' mental faculties. Like many, this jail has been held to be overcrowded, to constitute unconstitutional punishment in pretrial detention, and to impose

Edwards argued at trial that he had made no statement on the 20th is contradicted by its own record-cited reference, which shows that, in his unschooled words, he was asking the jury to consider if the statement was "with voluntarily made". S.A. 65, 66.

Simply put, the State's argument that Edwards intentionally made a statement and then structured subsequent events in order to manipulate the system makes no sense. Edwards may well have felt it psychologically necessary to relieve the police imposed pressure to give a statement by giving one, but his adamant refusal to allow that statement to be taped demonstrates clearly that he did not understand the consequences of speaking. Once in the interrogation room Edwards may have agreed to talk with the detectives, but it certainly is ludicrous to contend that he did so as part of some bizarre design to defend himself by making a statement he could later claim did not exist.[6]

II

Errors By The State in Discussing *Miranda, Mosley,* And Case Law From The Circuit Courts Of Appeal.

The State stubbornly refuses to accept the fact that this Court, in *Miranda* and *Mosley,* has established different

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privations, hardships and risks of violence upon those who are jailed. *Erickson* v. *Dupnik,* Civ. No. 78-008-TUC-MAR (D. Ariz. 1980). This Court can, of course, judicially notice such a judgment of the District Court in the state from which Edwards' case was brought. Federal Rules of Evidence 201; *Gilmore* v. *City of Montgomery,* 417 U.S. 556 (1974).

[6] In fact, assuming the State is correct — that Edwards conjured up such a scheme, it is questionable whether the plan would materially

rules for custodial interrogation of an accused who asks for counsel, than it has for one who simply decides to remain silent. Similarly, the treatment in its brief of lower court cases on the subject misstates the law in the area.

The State argues[7] that neither *Miranda* nor subsequent cases of this Court interpreting it, distinguish between the situation of an accused claiming his right to be silent and that where he asks for the assistance of counsel, as to limitations upon the right of police to conduct reinterrogations. The argument is founded upon a selectively misleading quotation from the *Miranda* opinion. The State simply left out of its brief the paragraph, 384 U.S. at 474, which said that police cannot reinterrogate a suspect who has asked for an attorney until they provide him one. The paragraph is one of three that have been quoted over and over again by this Court, but an understanding of the error made by the State requires that the section of *Miranda* be requoted here. As extracted by the State of Arizona in its Brief, page 18, the *Miranda* quotation is:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any

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aid him in front of a jury. Certainly, if such a plan existed, it is another in a plethora of indications that Edwards did not comprehend the effects of speaking without advice of counsel.

[7] R.B. 18, 19.

statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

* * * * *

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." R.B., page 18, citing *Miranda* v. *Arizona, supra.*

The State then notes, page 19, that the passage "does not say that the interrogation may not resume under any other circumstances [other than when an attorney is present]." But, the omitted paragraph of the opinion, represented by the above ellipsis in the State's Brief, says:

> "This does not mean, as some have suggested, that each police station must have a 'stationhouse lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege *so long as they do not question him during that time.*" 384 U.S. at 474. (Emphasis supplied.)

The State next characterizes this Court's holding in *Michigan* v. *Mosley,* 423 U.S. 96, in a way that refers to the bobtailed *Miranda* quotation in its Brief, in the following terms:

> "This Court then held that the passage did not create a '*per se* proscription of indefinite duration upon any further questioning by any police officer on any subject . . .' 423 U.S. at 102-103." Brief, page 18.

Again the elided material demonstrates the error. The rest of the sentence consists of the qualifier, contained at page 103 of 423 U.S., "once the person in custody has indicated *a desire to remain silent.*" (Emphasis supplied.)

By careful selection, the State has argued that what was intended in *Miranda* and *Mosley* to refer to the situation where an accused has chosen to remain silent, also allows reinterrogation after the accused has asked for an

attorney. This Court has clearly stated otherwise. *Michigan* v. *Mosley, supra,* 423 U.S. at 104 n.10 (*Miranda* "distinguishes between the procedural safeguards triggered by a request to remain silent and a request for an attorney, and directs that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney' "); *id.,* at 109 (White J., concurring) ("The Court showed in the very next paragraph [the one omitted by the State of Arizona] that, when it wanted to create a per se rule against further interrogation after assertion of a right, it knew how to do so."); *Fare* v. *Michael C.,* 442 U.S. 707, 719 (1979) ("the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease"). In short, this Court has understood the distinction, even if the State has not. But the State's misreading of the law does not stop with this Court's decision.

Both in the discussion of its own authorities on the subject, and its analysis of the cases cited by Edwards in the Opening Brief, the State misstates the status of the law among the Circuit Courts of Appeal on whether an accused can be reinterrogated after he asks for a lawyer.[8]

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[8] The State's Brief is strangely silent on the authorities, from the various states cited in the Opening Brief, recognizing a rule against reinterrogation of a suspect who asks for counsel. Opening Brief, page 20, n. 12, page 23, n. 14.

The State cites *U.S.* v. *Hauck,* 586 F.2d 1296 (8th Cir. 1978), *cert. denied,* 441 U.S. 947 (1979), and *Cobbs* v. *Robinson,* 528 F.2d 1331 (2d Cir. 1975), *cert. denied,* 424 U.S. 947 (1976), for the proposition that those circuits which have "addressed this issue have held that there is no such per se rule" (R.B. 10-11). Neither case mentions a per se rule at all.[9]

The State similarly misapprehends the cases cited by Edwards in his Opening Brief. As much is evident from the statement, R.B. 14, that "the cases cited by Petitioner do not lend support for his position. They address the situation where a suspect requests an attorney, but the police continued questioning the suspect in spite of the request." The quoted assertion by Arizona applies quite precisely to what happened to Edwards: He asked for an attorney, but they kept on questioning him the next morning.

And, the misapprehension borders on plain misstatement. For instance, at R.B. 15, the Respondent says that

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[9] In *Cobbs,* the defendant called his grandmother instead of a lawyer when given the opportunity to use a phone. The Second Circuit held this to be an abandonment of the right to counsel, 528 F.2d at 1342. Petitioner concedes (Brief, p. 17) that intentional delay on the part of a criminal suspect in obtaining or seeking the advice of counsel may justify further interrogation. But, in the case at bar, Petitioner had never had a chance to obtain counsel. In *Hauck,* the defendant "affirmatively withdrew his request for counsel before the interview continued." 586 F.2d at 1298. This holding is in line with Petitioner's contention that only defendant-initiated waiver may be allowed.

Thompson v. *Wainwright,* 601 F.2d 768 (5th Cir. 1979), "does not say that there could not be a subsequent knowing and intelligent waiver of counsel; it merely says in that case there was none." To the contrary:

> "The more troublesome issue in this case is whether officers Cunningham and Latham violated the per se rule, established in Miranda and well recognized in this circuit, that requires all custodial interrogation to cease once the suspect asks for an attorney." 601 F.2d at 770-71.

Similary, respondent claims that *U.S.* v. *Priest,* 409 F.2d 491 (5th Cir. 1969), does not address the issue now before the Court, "that is, whether there can be a subsequent waiver of the right to an attorney once the suspect has requested one." R.B. 17. *Priest,* however, clearly states:

> "Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible." 409 F.2d at 493.

The State also claims that *United States* v. *Blair,* 470 F.2d 331 (5th Cir. 1972), *cert. denied sub nom Crews* v. *United States,* 411 U.S. 908 (1973) did not address the waiver or "per se" issue. But it did, emphasizing with italics *Miranda's* instruction that, if the Defendant asks for a lawyer, "interrogation must cease until a lawyer is present" and "there can be no questioning", 470 F.2d at 338. To the Government's rejoinder of a claimed waiver, the court said "[T]his circuit has squarely faced and rejected the Government's theory on several previous occasions." *Ibid.*

In sum, if *Miranda* is to be given a logical application, consistent with its constitutional purpose,[10] this Court should decline the State's invitation to blur the distinction between those who claim their right to counsel, as to whom reinterrogation is disapproved, and those who choose to remain silent, where reinterrogation may be permitted if the suspect's right to remain silent is scrupulously honored.

III

The State's Misapprehension Of The Distinction Between The Right To Counsel And The Privilege Against Self-Incrimination, And Its Incorrect Conclusion Concerning Waiver Of Sixth Amendment Rights To Counsel

The State of Arizona has not deigned to tackle this Court's distinction between situations where counsel is requested and those in which the right to silence is invoked. It has not disagreed with this Court's reasoning, cited in our Brief, p. 16, that a claim of the right to counsel is different because the accused has acknowledged his inability to deal with the police. Instead, the State turns, as did the Arizona Supreme Court, to the assertion that this Court's statement of concern in *Mosley, supra,* about rules that would provide "wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessment of their interests", applies in this case.

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[10] "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda,* disparage it, nor extend it at this late date". *Rhode Island* v. *Innis,* ____ U.S. ____, ____ (1980) (Burger, C.J., concurring).

Mosley, of course, spoke to situations where the accused decides to remain silent, and not where he asks for counsel. But, in any event, those concerns are inapplicable to the situation posed by this case.

The State's argument is that a per se rule, or even one allowing only defendant-initiated interrogation, would wrongfully prevent a criminal suspect from changing his mind when he has once chosen to request the assistance of counsel in his defense. Especially if defendant-initiated reinterrogations are allowed, this assertion is untenable. The State apparently bases its argument[11] on the view that the police should be allowed to present evidence to an accused in order to fill him in on the state of the case against him, so that he may make a rational and informed decision as to whether to remain resolute in his desire to consult an attorney. Surely, Edwards was not in a position to evaluate the evidence from a legal standpoint in the way his lawyer could have. It is hard to conceive of any aspect of his overnight stay, in isolation in a sordid jail, that better equipped Edwards to reconsider his decision of the day before that he needed a lawyer to help him deal with the State's charges and its interrogation of him. It hardly requires detailed recitation of the fear, loneliness, and sensory deprivation that resulted from Edwards' jailing after his arrest for murder, to recognize that any statement obtained on January 20 was theproduct of subtle coercion caused by custody. It was not the result of a "rational and

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[11] See R.B. 21-23.

informed" change of mind about the need for a lawyer. When a suspect is to be appointed counsel in a matter of hours and has repeatedly asserted his rights to a lawyer and to silence (illustrating his self-determined conviction that he does not want to stand alone against the State), it is absurd to argue that presenting evidence to him, after such an interlude in jail, will aid his decision more than would presenting the evidence to his lawyer several hours later.

The State contends that prohibiting reinterrogations after an accused asks for counsel would hamper investigative processes. But criminal prosecution had already been commenced against Edwards.[12] This case does not concern investigative processes. It concerns the conduct of the authorities toward a criminal defendant after commencement of prosecution, and their attempts to secure a conviction before actual trial had begun. This is an extremely important distinction. There is a vast difference between attempting to ascertain the identity of the perpetrator of a crime, on the one hand, and admittedly endeavoring to secure incriminating statements from a criminal defendant who, having been formally charged, is in custody, with the entire focus of the State's "trial preparation" techniques trained on him. While this Court properly considered in *Mosley, supra,* the effect upon investigative activities of a per se rule against

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[12] See R.B. 24, n. 47, where the State acknowledges "that Petitioner's right to an attorney existed from the moment he was formally charged by the State on January 19, 1976."

reinterrogating an accused who chooses to remain silent, that concern is lacking here, and the Arizona Court's citation to *Mosley's* statement as if it applied letter-for-letter to a deprivation of the right to counsel is inapposite.[13]

The State's waiver analysis is also simplistic. Because of the difference between situations after prosecution has commenced, where the right to counsel implicit in a fair trial is involved, and those beforehand, where investigative interrogations are common and the Fifth Amendment rights are being protected, a higher standard of waiver unquestionably applies. The closest the State has come to recognizing this is its contention, R.B. 26, that *Brewer* v. *Williams,* 430 U.S. 387 (1977), holds that such a right to counsel can be waived. In fact, this Court simply said in *Brewer* that it was not reaching the question whether the right to counsel could be waived without notice to counsel; it said only that Williams did not waive his right to counsel, reserving the question of whether he could ever do so. *See, id.,* 430 U.S. 405-06. The State mutilates this statement into a rule that waivers of Sixth Amendment trial counsel rights can always be made.

Not quarreling with the proposition that interrogating an accused who has a right to counsel before counsel can attend is improper, unethical, and perhaps unconsitutional, the State merely says that Edward is precluded

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[13] As we have already noted, there are, of course, additional distinctions between *Mosley* and this case, founded upon the significance of an accused asking for a lawyer's help, rather than simply choosing to be silent.

from raising this point. The issue is properly framed. First, the admissibility of the confession, because of the hurried interrogation before arraignment, was raised and passed upon on Sixth and Fourteenth Amendment grounds by the lower courts below.[14] Moreover, it makes no difference whether the language of cases talking about ethical violations and violations of fundamental fairness have previously formed part of the arguments in this case, for this Court's rule is well-settled that an issue is not precluded if it is "an enlargement of" that presented to the state court or if it is "so connected with it in substance as to form but another ground or reason" that the same constitutional claim should be recognized. *Dewey* v. *City of Des Moines,* 173 U.S. 193 (1899). Here, the same Sixth and Fourteenth Amendment rights to counsel and to due process generally are being asserted before this Court as were raised below. Additional cases have developed additional but integrally related reasons for this Court to conclude that a violation of either the right to counsel or due process occurred. *See* P.B. at 45 (ethical propriety of interrogation should form part of definition of due process).

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[14] The trial court expressly considered the case of *State ex rel Berger* v. *Superior Court,* 105 Ariz. 553, 468 P.2d 580 (1970), J.A. 93, which deals with the right of police to interrogate one who is entitled to counsel, without telling appointed counsel they are doing so. Of course, the issue was squarely before the Arizona Supreme Court, by virtue of Justice Gordon's dissent which said "I cannot condone the tactics of the investigating detectives . . . knowing that an attorney would not be appointed for him until the afternoon", J.A. 30.

For these reasons, police activity, which may pass muster when judged relative to a suspect's Fifth Amendment rights, may not comport with the more stringent requirements surrounding a suspect's Sixth Amendment right to counsel in criminal proceedings. *Carvey* v. *LaFever,* 611 F.2d 19 (2d Cir. 1979).[13] Not only are courts more stringent in forbidding interference with a suspect's Sixth Amendment rights, they place a higher burden on the State if a waiver of such rights is sought to be shown. *Id.; United States* v. *Satterfield,* 558 F.2d 655 (2d Cir. 1976).

The State has not met the heavy burden placed upon it to prove that Petitioner knowingly, intelligently and understandingly waived his Sixth Amendment right to counsel. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). The trial court never found that Petitioner had waived his Sixth Amendment rights. If the Arizona Supreme Court made such a finding, it was only by implication and was

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[13] The State made an interestingly selective use of *Carvey* v. *LeFever* at R.B. 24. First, it argued that Carvey stands for the proposition that the Sixth Amendment right to counsel can be waived. In the very next paragraph, it argues that the waiver of Fifth and Sixth Amendment rights to counsel are to be judged similarly. *Carvey* does support the State's first contention here, a point with which we disagree. But continues:

> "What might suffice to comply with Miranda will not necessarily meet 'the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached.' " 611 F.2d at 22.

based on the erroneous use of the standard of *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973), not *Johnson* v. *Zerbst.*[16] *Schneckloth* promulgated the standard applicable to determining the voluntariness of Fourth Amendment consents. It held that a court should look at the totality of the circumstances, and that knowledgeof the right was only one factor to be considered. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226-27. But, in the same opinion, it was recognized that *Johnson* v. *Zerbst* set the standard for the waiver of the Sixth Amendment right to counsel, to be "an intentional relinquishment of a known right or privilege." 412 U.S. at 236-37. The Arizona court applied the first standard, which actually relates only to the Fourth Amendment. It did not apply the standard it should have, that arising from *Johnson* v. *Zerbst* and the Sixth Amendment. Significantly, Justice Gordon's dissent recognizes that the majority did not apply the correct standard and that the facts of the case would not fulfill the *Johnson* v. *Zerbst* test. *See* 122 Ariz. at 217, 594 P.2d at 83 (Gordon, J., dissenting).

The facts which the State offers as proof of Petitioner's waiver of the right to counsel are relevant only, if at all, to a waiver of the right to remain silent. Arguments to the effect that Petitioner was warned, supposedly four times, about making a statement (R.B. 30) and that a psychiatrist

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[16] The Arizona Supreme Court cited to that section of *Schneckloth* in which Mr. Justice Stewart was rejecting the notion that a person must be advised of his right to refuse consent to a search before any consent could be considered voluntary.

testified that Petitioner could understand that anything he said would be used against him (R.B. 31) are not relevant to whether Petitioner waived his Sixth Amendment rights to counsel. Neither are arguments concerning the absence of coercion from solitary confinement (R.B. 28). These argument go toward the voluntariness of the giving of a statement under Miranda, not the understanding or intelligent nature of an alleged waiver of counsel under *Brewer* v. *Williams,* 430 U.S. 387 (1977), or *Massiah* v. *United States,* 377 U.S. 201 (1964). To make that leap requires a feat of nonsequitur logic that simply does not work.

MICHAEL J. MEEHAN
Post Office Box 2268
Tucson, Arizona 85702
(602) 622-3531
Court Appointed Attorney for Petitioner